

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION**

BOARD OF EDUCATION OF SHELBY)
COUNTY, TENNESSEE, et al.,)
)
Plaintiffs,)
)
v.) **No. 11-2101**
)
MEMPHIS CITY BOARD OF)
EDUCATION, et al.,)
)
Defendants.)

ORDER

This case was brought by the Board of Education of Shelby County, Tennessee (the "Shelby County Board of Education"), which filed a complaint for declaratory judgment on February 11, 2011. The Board sought a declaration of the rights of the parties insofar as those rights might be affected by the transfer of the administration of the Memphis City Schools to the Shelby County Board of Education.

On August 8, 2011, the Court entered an order (the "August 8 Order") declaring the rights of the parties and concluding that the Shelby County Board of Education's current voting districts are unconstitutional because they violate the one-person, one-vote principle. The Court did not declare a remedy, but directed the parties to submit proposed remedy requests.

After receiving the parties' suggested remedies, the Court conducted a judicial mediation. The product of that mediation was a proposed settlement, stated in a Memorandum of Understanding (the "MOU") filed in open court on August 24, 2011. All parties, except the Tennessee Department of Education (the "Department") and Kevin Huffman, in his capacity as Commissioner of the Department ("Huffman"), agreed to the MOU and signed it. Huffman and the Department moved to be dismissed without prejudice. With the consent of all parties, that motion was granted.

The MOU was not a final agreement. It was subject to approval by the four public entities affected and to adoption by the Court. Each of the four entities has now approved the tentative agreement. The Shelby County Board of Education and the Memphis City Board of Education did so on August 25, 2011. (Notice of Approval of Memorandum of Understanding and Transition Team Appointments, ECF No. 259; Notice of Approval of Memorandum of Understanding, ECF No. 258.) The Board of County Commissioners of Shelby County, Tennessee (the "Shelby County Commission") approved the agreement on August 29, 2011. (Certification, ECF No. 260-1.) The Memphis City Council approved it on September 6, 2011. (City Council Resolution, ECF No. 254-1.) The agreement expressed in the MOU is now binding

on all of the parties subject to its adoption by the Court and incorporation into a consent decree.

I. LAW

A federal court has inherent equitable authority to remedy a violation of the United States Constitution. Assoc. Gen. Contractors of Am. v. Columbus, 172 F.3d 411, 417 (6th Cir. 1999). That authority is broad and flexible. The remedy, however, should extend no further than necessary to correct the violation. The Court must exercise its authority with discretion. The parties' "freedom of choice to devise substitutes . . . should not be restricted." Burns v. Richardson, 384 U.S. 73, 85 (1966).

The proposed settlement, embodied in the MOU and submitted as a consent decree, reflects the political judgment and "policy choices of the elected representatives of the people." Wise v. Lipscomb, 437 U.S. 535, 548 (1978). The Supreme Court has directed courts to defer to the political process. Upham v. Seamon, 456 U.S. 37, 41-42 (1982). The public entities involved "must have discretion to exercise the political judgment necessary to balance the competing interests." Miller v. Johnson, 515 U.S. 900, 915 (1995).

"Consent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms . . . Naturally, the agreement reached normally

embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation." Firefighters v. Cleveland, 478 U.S. 501, 525 (1986). "[A] federal court is not necessarily barred from entering a consent decree merely because the decree provides broader relief than the court could have awarded after a trial." Id. at 525.

Consent decrees are viewed in light of "a presumption in favor of voluntary settlement." United States v. Akzo Coatings of Am., Inc., 949 F.2d 1409, 1436 (6th Cir. 1991). "It is well settled that the function of the reviewing court is not to substitute its judgment for that of the parties to the decree but to assure itself that the terms of the decree are fair and adequate and are not unlawful, unreasonable, or against public policy." United States v. Hooker Chems. & Plastics Corp., 540 F. Supp. 1067, 1072 (W.D.N.Y. 1982). "[A] district court should enter a proposed consent judgment if the court decides that it is fair, reasonable, and equitable and does not violate the law or public policy." Sierra Club, Inc. v. Elect. Controls Design Inc., 909 F.2d 1350, 1355 (9th Cir. 1990). "The test is not whether this Court would have fashioned the same remedy nor whether it is the best possible settlement," but whether it is substantively and procedurally fair. United States v. BP Exploration & Oil Co., 167 F. Supp. 2d 1045, 1050 (N.D. Ind.

2001); see also Meadwestvaco Corp. v. United States, No. 10-250, 2011 U.S. Dist. LEXIS 15763, at *6-7 (E.D. Tenn. Feb. 16, 2011) ("[T]he court should defer to the judgment of experienced counsel.") (quoting Williams v. Vukovich, 720 F.2d 909, 922-23 (6th Cir. 1983)). The court decides whether a consent decree should be upheld using "the standard of fairness [and] reasonableness." Akzo, 949 F.2d at 1426; see also United States v. Muskegon, 298 F.3d 569, 580-81 (6th Cir. 2002) (same).

The key factor in determining whether a decree is fair and reasonable is "protection of the public interest." Akzo, 949 F.2d at 1436. The Sixth Circuit has held that among the factors to be considered are "the strength of plaintiff's case, the good faith efforts of the negotiators, the opinions of counsel, and the possible risks involved in the litigation if the settlement is not approved." Id. Courts have focused on whether there was an arms-length, good faith negotiation. United States v. Nashville & Davidson Cnty., No. 07-1056, 2009 U.S. Dist. LEXIS 19979, at *59 (M.D. Tenn. Mar. 12, 2009).

Courts consider both substantive and procedural fairness. "The requirement of procedural fairness is satisfied if [a] proposed settlement is reached through arms-length negotiations in which all parties, including non-settlers, are afforded an opportunity to participate and [the parties] act in good faith." United States v. Grand Rapids, 166 F. Supp. 2d 1213, 1219 (W.D.

Mich. 2000). When "[the parties] negotiate[] the proposed consent decree in apparent good faith, fairness appears to weigh in favor of approving the consent decree." United States v. Lexington-Fayette, 591 F.3d 484, 489 (6th Cir. 2010). Substantive fairness is ordinarily a factor only in cases where multiple parties are liable for damages, such as waste cleanup. See, e.g., United States v. Atlas Lederer Co., 404 F. Supp. 2d 629, 636-639 (S.D. Ohio, 2005); United States v. BP Amoco Oil, 277 F.3d 1012, 1020 (8th Cir. 2002). The court considers whether a party is "bear[ing] the cost of the harm for which it is legally responsible." BP Amoco Oil, 277 F.3d at 1020. Because there are no damages in this case, substantive fairness is not an issue.

When a court assesses the reasonableness of a consent decree, it focuses on whether the decree will remedy the harm. Lexington-Fayette, 591 F.3d at 489-90. See also Akzo, 949 F.2d at 1436 (stating that courts focus on whether the "remedy will adequately address [the harm]."). Although Akzo is an environmental law case, it sets the standard for approving consent decrees in this Circuit. Akzo, 949 F.2d at 1437.

A number of district courts have considered the reasonableness of consent decrees in the context of constitutional violations. In Sanders v. United States Dept. of Housing & Urban Dev., a class action filed against HUD for

discrimination in Allegheny County, Pennsylvania, the lead plaintiff and HUD proposed a consent decree. 872 F. Supp. 216, 217 (W.D. Pa. 1994). The decree mandated construction of new housing units, improvements in current housing, and governmental funding to "redirect resources so that more home ownership assistance and development of affordable housing and employment opportunities can take place in impoverished African American communities." Id. at 219. Considering a Fourteenth Amendment Equal Protection violation, the court found that the remedies were reasonable, and focused on the fact that "[t]he result of [the parties'] effort is a decree that provides the most comprehensive relief to date for victims of housing segregation and discrimination." Id. at 222.

In Dillard v. City of Foley, plaintiffs challenged the city's election methods, alleging they violated Section 2 of the Voting Rights Act. 926 F. Supp. 1053, 1058 (M.D. Ala. 1995). 42 U.S.C. § 1973. The City of Foley had a practice of annexing majority-white neighboring communities and refusing petitions for annexation from minority neighboring communities. Id. The court approved a consent decree providing that two neighboring majority-African-American towns and five majority-white towns would conduct binding referenda to determine whether they should be annexed. Id. at 1059. The court found the decree mandated a reasonable remedy for the Voting Rights Act violation and would

"further the goal of a non-racially-selective annexation policy." Id. at 1065.

The immediacy of relief is also a factor in considering whether a consent decree is reasonable. In D.S. v. New York City Department of Education, the court adopted a consent decree that aimed to remedy a Fourteenth Amendment violation in New York City's school system, concluding that the decree would "offer[] immediate and critical relief to the class." 255 F.R.D. 59, 78 (E.D.N.Y. 2008). In Johnson v. Board of Education of Champaign Unit School District # 4, the court approved a settlement because it would "allow[] for the expeditious vindication of the rights of African-American children who have been denied, whether intentionally or unintentionally, the equal protection of the law and equal educational opportunity." 188 F. Supp. 2d 944, 973-74 (C.D. Ill. 2002).

II. ANALYSIS

The proposed settlement "resolve[s] a dispute within this court's jurisdiction . . . [and] come[s] within the general scope of the case made by the pleadings." Cleveland, 478 U.S. at 525. It is fair and reasonable. The negotiations and litigation were conducted and the settlement was approved by experienced counsel who negotiated in good faith under the auspices of the Court. Akzo, 949 F.2d at 1436. The parties pursued the litigation vigorously, and the proposed consent

decree was developed in light of the Court's August 8 Order and adopts that Order. There is no dispute about the fairness of this settlement.

As the Court directed in its August 8 Order, the parties proposed several remedies, ranging from an election "as soon as practicable", to a special election in March 2012, to an election on September 1, 2012. (Post-J. Mem. of Remedies of Intervening Defs. Memphis Educ. Assoc., Keith O. Williams, and Karl Thomas Emens, ECF No. 251; Memphis City Council's Req. for Remedy 16, ECF No. 250; Pl.'s Req. for Remedy of Constitutional Violation 3, ECF No. 249.) The parties also disagreed about how the Shelby County Board of Education should operate pending an election. The Memphis City Council, for example, asked the Court to:

enjoin the current school board to only consider and act upon routine matters related to normal operations of [the Shelby County School System] and [the Memphis City School System] and to prohibit any extraordinary actions related to consolidation of the two systems except pursuant to a plan approved by the Court or Court order until their successors are elected and qualified.

(Memphis City Council's Req. for Remedy 18, ECF No. 250.)

The remedies proposed would have complicated the management of the two school systems and created uncertainty during the transfer of administration. The proposed consent decree provides for management of the separate school systems by a

single board, preserving the membership of the City and County Boards, with the addition of seven members chosen by the Shelby County Commission, "the only party that has been elected by . . . all of the citizens of Shelby County." (Board of Comm'r's of Shelby County, Tennessee's Proposed Remedy for Constitutional Violations 3, ECF No. 248.) The decree will permit freedom of action by the newly constituted Shelby County Board of Education and allow the parties to begin the transition.

The proposed consent decree remedies the malapportionment within a reasonable time and is well within the Court's equitable power. Seventy-four percent of Shelby County's population is not represented on the present Shelby County Board of Education. Thus, there is a need for an immediate remedy, which the proposed consent decree provides.

The proposed decree brings finality to this matter. It prevents years of litigation and establishes the basis for cooperative solutions based on good public policy, rather than legal solutions imposed by the Court.

The proposed decree benefits all of the parties because the "consensus should enable the Parties to move this case forward to its orderly and just resolution, supporting each other's efforts rather than undermining them A cooperative effort is clearly the best way to resolve such a complex institutional reform case that affects so much of the public."

Reed v. Rhodes, 869 F. Supp. 1274, 1284 (N.D. Ohio 1994). The consent decree is within the Court's power and is fair and reasonable.

III. CONSENT DECREE

For the reasons stated in this Order and based in part on the analysis in the Court's August 8 Order, the Court ADOPTS the following Consent Decree, to which all of the parties have freely consented, and ORDERS its implementation.

CONSENT DECREE

1. The parties adopt and agree to abide by the Court's Order of August 8, 2011.
2. Effective October 1, 2011, the Memphis and Shelby County school systems will be governed by the Shelby County Board of Education, which shall consist of twenty-three (23) members. Nine (9) of the members will be present members of the Memphis City Board of Education. Seven (7) of the members will be present members of the Shelby County Board of Education. The sixteen (16) members from the Memphis and Shelby County Boards shall serve until September 1, 2013. The remaining seven (7) members will be appointed by the Shelby County Commission. The seven (7) appointed members shall be subject to election at the regularly scheduled county-wide election in August 2012 and shall

serve staggered terms as determined by the County Commission.

3. Each of the seven (7) appointed members shall be a resident of and represent a separate district in Shelby County. The Shelby County Commission shall determine the boundaries of the seven districts based on the 2010 United States Census, ensuring that the districts are of substantially equal population. The seven districts submitted by the Shelby County Commission are acceptable to the parties. The Shelby County Commission shall have the option of enlarging the Shelby County Board of Education and redistricting it so that the Board shall consist of not more than 13 members. No such enlargement or redistricting shall take effect before September 1, 2013.
4. The twenty-three (23) member Shelby County Board of Education will be responsible for adopting a transition plan, making all transition decisions, operating the two separate school systems, and providing information to the Commissioner of Education. The chairs of the existing Shelby County Board of Education and the Memphis City Board of Education shall each appoint 5 members of the transition planning commission, and each existing chair shall serve as an ex officio member of the commission.

5. The twenty-three (23) member Shelby County Board of Education shall elect its own officers and otherwise provide for its affairs.
6. On September 1, 2013, the terms of the sixteen (16) members of the Shelby County Board of Education who formerly served on the Memphis and Shelby County Boards will expire. Any vacancies in positions on the combined Shelby County Board of Education before that date shall be filled by the Shelby County Commission.
7. The Memphis and Shelby County school systems shall remain separate school systems until they are combined at the start of the school year in 2013. There shall be no change in the financing of the two school systems pending the combination of the systems at the start of the school year in 2013.
8. Effective September 1, 2013, the seven (7) members elected in August 2012 will constitute the Shelby County Board of Education and govern the combined school system. Present members of the Shelby County Board of Education and Memphis City Board of Education shall be eligible for appointment or election to one (1) of the seven (7) positions appointed by the Shelby County Commission and subject to election in 2012.

9. The United States District Court for the Western District of Tennessee retains jurisdiction to enforce this Consent Decree. The Court will appoint a special master to assist in implementing the Consent Decree and to resolve disputes among the parties as to any aspect of the transition to a combined school system or the operation of the separate school systems. The Court will decide the special master's compensation, which shall be paid one-half by the Memphis City Schools and one-half by the Shelby County Schools. The special master's function and the Court's supervision shall end on September 1, 2013.

The Court reserves its decision on the boundaries of the seven districts established by the Shelby County Commission until the Court has received and considered a complete list of the precincts to be included in each district.

So ordered this 28th day of September, 2011.

s/ Samuel H. Mays, Jr.
SAMUEL H. MAYS, JR.
UNITED STATES DISTRICT JUDGE